



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8

1595 WYNKOOP STREET

DENVER, COLORADO 80202-1129

Phone 800-227-8917

<http://www.epa.gov/region08>

SEP 13 2012

Ref: 8ENF-L

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
NO.

Mr. Nels Nelson
Registered Agent
Cactus Hill Ranch Company
38990 Hwy 257
Fort Collins, Colorado 80524

Re: Complaint and Notice of
Opportunity for Hearing
Docket No. **CWA-08-2012-0033**

Dear Mr. Nelson:

Enclosed is an administrative "Complaint and Notice of Opportunity for Hearing" (Complaint) filed against Cactus Hill Ranch Company (Cactus Hill) under section 309 of the Clean Water Act (CWA), 33 U.S.C. § 1319. The United States Environmental Protection Agency (EPA) alleges in the Complaint that Cactus Hill discharged pollutants from its concentrated animal feeding operation without a permit, in violation of section 301(a) of the CWA, 33 U.S.C. § 1311(a).

By law, Cactus Hill has the right to request a hearing regarding the matters set forth in the Complaint. Please pay particular attention to those parts of the Complaint under the heading "Notice of Opportunity to Request a Hearing." If Cactus Hill does not file an answer to this Complaint within 30 days of receipt, a default judgment may be entered and the proposed civil penalty may be assessed without further proceedings. In its answer Cactus Hill may request a hearing. Cactus Hill has the right to be represented by an attorney at any stage of these proceedings.

The EPA encourages all parties against whom it files any complaint proposing assessment of a penalty to pursue the possibilities of settlement through an informal conference. Any such settlement shall be finalized by a written consent agreement signed by the EPA and by Cactus Hill and the issuance of a final order by the Regional Judicial Officer, EPA Region 8, approving the consent agreement.

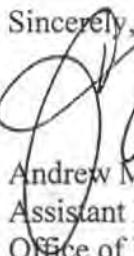
Whether or not Cactus Hill requests a hearing, its representative(s) may confer informally with the EPA concerning the alleged violations or the amount of the proposed penalty. However, an informal settlement conference does not substitute for filing a written answer and requesting a hearing. A request for an informal conference also does not extend the 30-day period during which Cactus Hill must submit

a written answer and a request for a hearing. Cactus Hill may simultaneously litigate this matter and informally discuss settlement with the EPA.

For any questions specific to the violations or penalty, the most knowledgeable people on my staff regarding this matter are Seth Draper, Environmental Scientist, who can be reached at 800-227-8917, extension 6763, or Peggy Livingston, Enforcement Attorney, who can be reached at 800-227-8917, extension 6858.

We urge your prompt attention to this matter.

Sincerely,



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosure

cc: Tina Artemis, Regional Hearing Clerk
Phyllis Woodford, Colorado Department of Public Health and Environment



Printed on Recycled Paper

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

2012 SEP 13 AM 8:04

In the Matter of:

Cactus Hill Ranch Company,

Respondent.

)
)
)
)
)

**COMPLAINT AND NOTICE OF
OPPORTUNITY FOR HEARING**
Docket No. CWA-08-2012-0033

FILED
EPA REGION VIII
HEARING BY MAIL

INTRODUCTION

In this Complaint and Notice of Opportunity for Hearing (Complaint), the United States Environmental Protection Agency (EPA) proposes to assess a civil administrative penalty against Cactus Hill Ranch Company (Respondent).

This Complaint is issued under the authority vested in the Administrator of the EPA by section 309(g) of the Clean Water Act (Act), 33 U.S.C. § 1319(g). The undersigned EPA official has been properly delegated the authority to issue this complaint.

This proceeding is subject to the EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits, 40 C.F.R. part 22 (Complainant's Exhibit 1).

ALLEGATIONS

1. In order to restore and maintain the integrity of the nation's water, section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of any pollutant by any person into navigable waters, unless authorized by certain other provisions of the Act, including section 402 of the Act, 33 U.S.C. § 1342.
2. Section 402 of the Act, 33 U.S.C. § 1342, establishes a National Pollutant Discharge Elimination System (NPDES) program, under which the EPA and, upon receiving approval from the EPA, states may permit discharges into navigable waters, subject to specific terms and conditions.
3. In 1975, the State of Colorado received approval by the EPA to administer a program for issuing NPDES permits.

4. The Respondent is a Colorado corporation.
5. The Respondent is a “person” as defined in section 502(5) of the Act, 33 U.S.C. § 1362(5), and 40 C.F.R. § 122.2.
6. The Respondent owns and/or operates an animal feeding facility located at 38990 Highway 257, Fort Collins, Colorado (the Facility).
7. On April 22, 2010, an EPA inspector, accompanied for part of the inspection by Colorado Department of Public Health and Environment (CDPHE) inspectors, inspected the Facility during a wet weather event and observed the following evidence of discharges of wastewater, manure, and litter from the Facility to the Larimer and Weld Canal:
 - a. the Larimer and Weld Canal, which is sometimes also known as the Eaton Canal and is shown as an irrigation ditch on the United States Geologic Survey topographic map of the area, is located approximately one-half (1/2) mile south of the Facility’s southernmost confinement pens,
 - b. wastewater that had been directly or indirectly used in the operation of the Facility was flowing from the Facility across the access road at the south entrance to the Facility and into ditches on both sides of Highway 257,
 - c. the ditches on both sides of Highway 257 flowed to the Larimer and Weld Canal,
 - d. feed, manure, and bedding were visible along the east and west roadside ditch along Highway 257,
 - e. feed, manure, and bedding were consolidated along the fence row along the west side of Highway 257,
 - f. feed, manure, and bedding were consolidated along the fence row on the north side of County Road 78, which is south of the Facility,
 - g. wastewater was flowing from the north side of County Road 78, through a metal culvert, and south from County Road 78 to the Larimer and Weld Canal, and
 - h. the Angle Field land application site to north of the Facility did not have a tail-water pond to collect excess land applied wastewater before entering Larimer County Ditch.
8. The wastewater referenced in paragraph 7, above, as having been directly or indirectly used in the operation of the Facility and having been observed flowing from the Facility into ditches on both sides of Highway 257 included water from spillage or overflow from

animal watering systems, from washing, cleaning, or flushing pens, manure pits, or other parts of the Facility, from direct contact swimming, washing, or spray cooling of animals, and/or from dust control, and water that had come into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs, or bedding.

9. The wastewater referenced in paragraphs 7 and 8, above, constitutes “process wastewater” as defined in 40 C.F.R. § 122.23(b)(7).
10. At the Facility, sheep and lambs are confined and fed for a total of 45 days or more in any 12-month period.
11. Crops, vegetation, forage growth, and post harvest residues at the Facility are not sustained in the normal growing season over any portion of the Facility’s feeding areas.
12. Because sheep and lambs are confined at the Facility for 45 days or more in any 12-month period, and because crops, vegetation, forage growth, and post-harvest residues at the Facility are not sustained in the normal growing season over any portion of the Facility’s feeding areas, the Facility is an “animal feeding operation” or “AFO” as defined in 40 C.F.R. § 122.23(b)(1).
13. At the time of the inspection referenced in paragraph 7, above, the Facility was confining and feeding approximately 11,000 sheep and lambs.
14. The Facility has a capacity for 75,000 sheep and lambs. It confines and feeds approximately 20,000 sheep and lambs for approximately nine months per year.
15. Because the number of sheep and lambs confined at the Facility is greater than or equal to 10,000, the Facility is a “concentrated animal feeding operation” or “CAFO” as defined in 40 C.F.R. § 122.23(b)(2) and section 502(14) of the Act, 33 U.S.C. § 1562(14), and a Large CAFO as defined in 40 C.F.R. § 122.23(b)(4).
16. Process wastewater, manure, and litter are each a “pollutant” as defined in section 502(6) of the Act, 33 U.S.C. § 1362(6).
17. The Facility is a “point source” as defined in section 502(14) of the Act, 33 U.S.C. § 1362(14).
18. The Larimer and Weld Canal is at least a seasonal waterway. It flows to Eaton Draw, which is at least a seasonal waterway. Eaton Draw flows to the Cache La Poudre River, which is a navigable-in-fact waterway. The Cache La Poudre River flows to the South Platte River, which is an interstate, navigable-in-fact waterway.

19. The Larimer and Weld Canal/Eaton Canal, Eaton Draw, the Cache La Poudre River, and the South Platte River are “waters of the United States” as defined in 40 C.F.R. § 122.2 and “navigable waters” as defined in section 502(7) of the Act, 33 U.S.C. § 1362(7).
20. At the time of the inspection referenced in paragraph 7, above, the Respondent had not applied for or received an NPDES permit authorizing any discharge of a pollutant from the Facility.
21. The Respondent has discharged pollutants from the Facility to navigable waters without authorization by an NPDES permit, in violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).
22. Based on rainfall data in the area of the Facility for the three years preceding the EPA’s inspection, it is likely that on at least eight separate days the Respondent discharged pollutants from the Facility to navigable waters without authorization by an NPDES permit.
23. Each day that the Respondent discharged pollutants to navigable waters without authorization by an NPDES permit constitutes a separate day of violation of section 301(a) of the Act, 33 U.S.C. § 1311(a).
24. On September 20, 2010, the EPA issued an Administrative Order for Compliance (Compliance Order) to the Respondent directing the Respondent, among other things, to submit a complete application for an NPDES permit to CDPHE.
25. After receiving the Compliance Order, the Respondent notified the EPA that on December 21, 2010, the Respondent had submitted an application for authorization to discharge pollutants under CDPHE’s General Permit for Concentrated Animal Feeding Operations.

PROPOSED ADMINISTRATIVE PENALTY

Based upon the foregoing allegations, and pursuant to its authority under section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), the EPA proposes to assess an administrative penalty of **\$35,000** against the Respondent.

Section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), as adjusted by inflation by 40 C.F.R. part 19, allows the EPA to assess an administrative penalty of up to \$16,000 per day for each day during which a violation of the Act continues, with a maximum penalty of \$177,500.

In proposing its penalty, and in accordance with § 309(g)(3) of the Act, 33 U.S.C. § 1319(g)(3), the EPA has considered the nature, circumstances, extent, and gravity of the

violations, the Respondent's prior compliance history, the Respondent's degree of culpability for the cited violations, any economic benefit or savings accruing to the Respondent by virtue of the violations, the Respondent's ability to pay the proposed penalty, and other matters that justice may require, as explained below:

Nature, Circumstances, Extent, and Gravity of Violations

The Respondent owns and operates a Large CAFO, which was discharging pollutants without a permit.

Prior Compliance History

The Compliance Order was the first enforcement action the EPA has taken against the Respondent requiring compliance with the Act.

Degree of Culpability

The Respondent should have been aware of the permit requirements for its discharges before the EPA/CDPHE inspection and the issuance of the EPA's Compliance Order.

Economic Benefit

The Respondent received an economic benefit from its failure to comply with the Act. The Respondent benefited financially by postponing expenditures needed to prevent discharges and to submit a permit application.

Ability to Pay

The EPA did not reduce the proposed penalty due to this factor, but it will consider any information the Respondent may present regarding the Respondent's ability to pay the penalty proposed in this complaint.

Other Matters that Justice may Require

The EPA is making no adjustments regarding these factors at this time.

NOTICE OF OPPORTUNITY TO REQUEST A HEARING

As provided in section 309(g)(2)(B) of the Act, 33 U.S.C. § 1319(g)(2)(B), and 40 C.F.R. § 22.15(c), the Respondent has the right to request a hearing in this matter. If the Respondent (1) contests any material fact upon which the Complaint is based, (2) contends that the amount of penalty proposed in the Complaint is inappropriate, or (3) contends that it is entitled to judgment

as a matter of law, it must file a written answer in accordance with 40 C.F.R. § 22.15 within thirty days after service of the Complaint.

The Respondent's answer must clearly and directly admit, deny or explain each factual allegation in the Complaint. The answer must also state the grounds for any defense the Respondent claims, any facts the Respondent disputes, any basis the Respondent claims for opposing the assessment of the penalty proposed above, and whether the Respondent requests a hearing on this Complaint. Please see 40 C.F.R. § 22.15 (included in Complainant's Exhibit 1) for more information on what must be in the answer.

Failure to file an answer or a request for hearing within 30 days may waive the Respondent's right to disagree with the allegations in this Complaint and/or the proposed penalty. It may also result in a default judgment and assessment of the either full penalty proposed in this Complaint.

An original and one copy of the Respondent's answer and each other document filed in this action must be filed with:

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, Colorado 80202-1129

A copy of the answer and each other document filed in this action must be mailed to:

Margaret J. (Peggy) Livingston
Senior Enforcement Attorney
U.S. Environmental Protection Agency (8ENF-L)
1595 Wynkoop Street
Denver, Colorado 80202-1129

If there is a hearing on this matter, it would be before an administrative law judge (ALJ), who will be responsible for deciding whether the EPA's proposed penalty is appropriate. The ALJ is not bound by the penalty proposed in this Complaint and may assess a penalty above the proposed amount, up to the maximum amount authorized by the Act.

CONSULTATION WITH STATE

Pursuant to section 309(g) of the Act, 33 U.S.C. §1319(g), the EPA has, prior to issuing this Complaint, consulted with CDPHE regarding assessment of this administrative penalty by furnishing CDPHE a copy of this complaint and inviting it to comment.

PUBLIC NOTICE

As required by section 309(g)(4) of the Act, 33 U.S.C. § 1319(g)(4), and 40 C.F.R. § 22.45, prior to assessing an administrative penalty, the EPA will provide public notice of the proposed penalty and a reasonable opportunity for the public to comment on the matter and, if a hearing is held, to be heard and present evidence.

QUICK RESOLUTION

The Respondent may resolve this proceeding at any time by paying the penalty amount proposed in this Complaint. Such payment need not contain any response to, or admission of, the allegations in this Complaint. Such payment would waive the Respondent's right to contest the allegations in this Complaint and to appeal any final order resulting from this Complaint.

The Respondent may elect to follow the quick resolution process described in 40 C.F.R. § 22.18. According to 40 C.F.R. § 22.18(a), if the Respondent pays the full proposed penalty within 30 days of receiving this Complaint, the Respondent need not file an answer. The Respondent is encouraged to consult 40 C.F.R. § 22.18 (included in Complainant's Exhibit 1) and to contact the Enforcement Attorney named above (by telephone at 1-800-227-8917, extension 6858, or 303-312-6858) for more information about the quick resolution process.

The penalty payment must be made by certified or cashier's check payable to "Treasurer, the United States of America."

If the check is sent by first class U.S. mail, it is to be addressed to:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

If the check is sent by Federal Express, Airborne, or other commercial carrier, it is to be addressed to:

US Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
St. Louis, Missouri 63101

A copy of the check shall be mailed to the Regional Hearing Clerk and the EPA Region 8 Enforcement Attorney named above (at the addresses provided above) and to:

Seth Draper
Environmental Scientist
U.S. Environmental Protection Agency (8ENF-W-P)
1595 Wynkoop Street
Denver, Colorado 80202-1129

A transmittal letter identifying the case title and docket number (shown on the first page of this Complaint) must accompany the remittance and each of the three copies of the check.

Payment of the penalty in this manner shall constitute the Respondent's consent to the assessment of the penalty proposed in this Complaint and a waiver of the Respondent's right to a hearing in this matter.

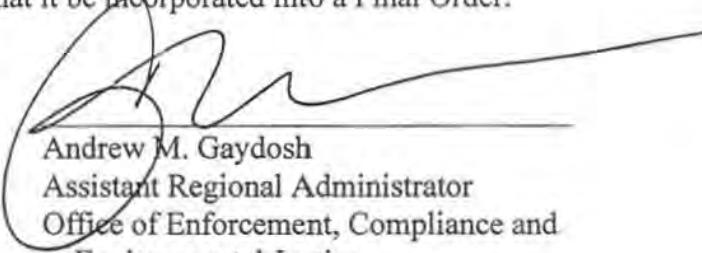
Neither assessment nor payment of the administrative penalty shall affect the Respondent's continuing obligation to comply with the Act, the Order, or any other federal, state, or local law.

SETTLEMENT NEGOTIATIONS

The EPA encourages informal settlement conferences. If the Respondent wishes to pursue the possibility of settling this matter, the Respondent should contact the EPA Enforcement Attorney named above by mail at the address provided above and/or by telephone at 1-800-227-8917, extension 6858, or 303-312-6858. However, contacting an EPA attorney, requesting a settlement conference, or participating in settlement discussions with the EPA will NOT postpone the Respondent's 30-day deadline for filing a written answer and requesting a hearing. The EPA and the Respondent may simultaneously discuss settlement and proceed with the administrative litigation process. If the EPA and the Respondent agree to a settlement, they will enter into a written Consent Agreement that will be presented to the Regional Judicial Officer with a request that it be incorporated into a Final Order.

Date: Sept. 13, 2012

By:



Andrew M. Gaydosh
Assistant Regional Administrator
Office of Enforcement, Compliance and
Environmental Justice
Region 8
U.S. Environmental Protection Agency
1595 Wynkoop Street
Denver, Colorado 80202

CERTIFICATE OF SERVICE

I certify that on the date noted below, I sent by certified mail, return receipt requested, a copy of the foregoing Complaint and Notice of Opportunity for Hearing, with a copy of the EPA's Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits, 40 C.F.R. part 22 (marked as Complainant's Exhibit 1) to:

Nels Nelson, Registered Agent
Cactus Hill Ranch Company
38990 Highway 257
Fort Collins, Colorado 80524

Certified Return Receipt No. 7009-3410-0000-2597-6148

I further certify that on the same date below I sent by certified mail, return receipt requested, a copy of this Complaint to:

Phyllis Woodford
Colorado Department of Public Health and Environment
4300 Cherry Creek Drive South
Denver, Colorado 80246-1530

Certified Return Receipt No. 7009-3410-0000-2597-6148

I further certify that the original and one copy of this Complaint, each with the first page of Exhibit 1, were hand-delivered to:

Tina Artemis
Regional Hearing Clerk
U.S. Environmental Protection Agency (8RC)
1595 Wynkoop Street
Denver, Colorado 80202-1129

Date: 9/13/2012

By: Judith M. McTernan

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 8
1595 Wynkoop Street, Denver, CO 80202-1129

**PUBLIC NOTICE OF PROPOSED PENALTY COMPLAINT AND
OPPORTUNITY TO COMMENT**

Action: The United States Environmental Protection Agency Region 8 (EPA) is providing notice to the public of the opportunity for any member of the public to comment on an administrative complaint for penalties (Complaint) being issued by EPA for alleged violations of the Clean Water Act (CWA) by Cactus Hill Ranch Company (Cactus Hill). The corporate address of Cactus Hill is 38990 Hwy 257, Fort Collins, CO 80524.

Summary: The EPA is authorized by section 309(g)(2) of the CWA, 33 U.S.C. § 1319(g)(2), to issue an order assessing a civil administrative penalty for violations of certain CWA requirements, after providing (1) an opportunity for the person to be assessed the penalty (the respondent) to request a hearing to contest the penalty, and (2) notification to the public of the right of the public to submit written comments and to participate in any hearing. The deadline for the public to submit comments for the Complaint is thirty (30) days after first issuance of this notice. Please see the following EPA Region 8 website for the date the public comment period on this Complaint begins: <http://www.epa.gov/region8/compliance/publicnotice/>.

The EPA Docket Number for Complaint is **CWA-08-2012-0033**

In the Complaint, EPA alleges that Cactus Hill has discharged pollutants into waters of the United States without authorization on at least eight (8) specific dates at its Concentrated Animal Feeding Operation.

The Complaint proposes that a total penalty of \$35,000.00 be imposed for the alleged violation.

PUBLIC COMMENTS

Written comments on the Complaint are encouraged and will be accepted at the address listed below for a period of thirty (30) days after the first publication of this notice. Written comments submitted by the public as well as information submitted by Cactus Hill will be available for public review, subject to the provisions of law restricting the disclosure of confidential information. Any person submitting written comments has a right to participate in a hearing, if one is held. The complaint is available for review between 9:00 a.m. and 4:00 p.m. at the address listed below and on the internet at: <http://yosemite.epa.gov/oa/rhc/epaadmin.nsf> by searching for the company name or Docket Number.

Please submit written comments to:

Tina Artemis (8RC)
Regional Hearing Clerk
U.S. EPA, Region 8
1595 Wynkoop Street
Denver, CO 80202-1129
Telephone: (303) 312-6765

FOR FURTHER INFORMATION: Persons wishing to receive a copy of the Complaint or other documents in, or relating to, this proceeding (such as the regulations at 40 C.F.R. Part 22, which set out the administrative hearing process), or to comment upon the proposed penalty assessment or upon any other aspect of this matter, should contact the Regional Hearing Clerk identified above.

§21.13

approve or disapprove the State issued statement, in accordance with the requirements of § 21.5.

(2) The Regional Administrator will periodically review State program performance. In the event of State program deficiencies the Regional Administrator will notify the State of such deficiencies.

(3) During that period that any State's program is classified as deficient, statements issued by a State shall also be sent to the Regional Administrator for review. The Regional Administrator shall notify the State, the applicant, and the SBA of any determination subsequently made, in accordance with § 21.5, on any such statement.

(i) If within 60 days after notice of such deficiencies has been provided, the State has not taken corrective efforts, and if the deficiencies significantly affect the conduct of the program, the Regional Administrator, after sufficient notice has been provided to the Regional Director of SBA, shall withdraw the approval of the State program.

(ii) Any State whose program is withdrawn and whose deficiencies have been corrected may later reapply as provided in § 21.12(a).

(g) Funds appropriated under section 106 of the Act may be utilized by a State agency authorized to receive such funds in conducting this program.

§ 21.13 Effect of certification upon authority to enforce applicable standards.

The certification by EPA or a State for SBA Loan purposes in no way constitutes a determination by EPA or the State that the facilities certified (a) will be constructed within the time specified by an applicable standard or (b) will be constructed and installed in accordance with the plans and specifications submitted in the application, will be operated and maintained properly, or will be applied to process wastes which are the same as described in the application. The certification in no way constitutes a waiver by EPA or a State of its authority to take appropriate enforcement action against the owner or operator of such facilities for violations of an applicable standard.

PART 22—CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENT OF CIVIL PENALTIES AND THE REVOCATION/TERMINATION OR SUSPENSION OF PERMITS

Subpart A—General

Sec.

- 22.1 Scope of this part.
- 22.2 Use of number and gender.
- 22.3 Definitions.
- 22.4 Powers and duties of the Environmental Appeals Board, Regional Judicial Officer and Presiding Officer; disqualification, withdrawal, and reassignment.
- 22.5 Filing, service, and form of all filed documents; business confidentiality claims.
- 22.6 Filing and service of rulings, orders and decisions.
- 22.7 Computation and extension of time.
- 22.8 *Ex parte* discussion of proceeding.
- 22.9 Examination of documents filed.

Subpart B—Parties and Appearances

- 22.10 Appearances.
- 22.11 Intervention and non-party briefs.
- 22.12 Consolidation and severance.

Subpart C—Prehearing Procedures

- 22.13 Commencement of a proceeding.
- 22.14 Complaint.
- 22.15 Answer to the complaint.
- 22.16 Motions.
- 22.17 Default.
- 22.18 Quick resolution; settlement; alternative dispute resolution.
- 22.19 Prehearing information exchange; prehearing conference; other discovery.
- 22.20 Accelerated decision; decision to dismiss.

Subpart D—Hearing Procedures

- 22.21 Assignment of Presiding Officer; scheduling the hearing.
- 22.22 Evidence.
- 22.23 Objections and offers of proof.
- 22.24 Burden of presentation; burden of persuasion; preponderance of the evidence standard.
- 22.25 Filing the transcript.
- 22.26 Proposed findings, conclusions, and order.

Subpart E—Initial Decision and Motion to Reopen a Hearing

- 22.27 Initial decision.
- 22.28 Motion to reopen a hearing.